92-1326

Supreme Court, U.S.
FILED
FEB 5 1993
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

MARK HETZNER,

Petitioner

vs

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

Michigan Court of Appeals No 124 959

PETITION FOR A WRIT OF CERTIORARI

Carl Ziemba
Attorney for Petitioner
Counsel of Record
703 W Hancock
Detroit, Michigan 48201
(313) 833 5145

QUESTION PRESENTED

DID THE ADMISSION INTO EVIDENCE OF RANK HEARSAY BY A MEDICAL DOCTOR OF WHAT THE CHILD VICTIM OF A SEXUAL ASSAULT TOLD HIM IN ORDER TO BOLSTER THE TESTIMONY OF THE CHILD VICTIM RENDER PETITIONER'S TRIAL FUNDAMENTALLY UNFAIR SO AS TO VIOLATE DUE PROCESS?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
AUTHORITIES CITED	iii
OPINION AND ORDER BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	25

APPENDIX

Opinion and Judgment of Michigan Court of Appeals	1a
Order of Michigan Supreme Court Denying Leave to Appeal	11a

AUTHORITIES CITED

CASES: **Page**

California v Green, 399 US 149 (1970) . . . 7

Lisenba v California, 314 US 219 (1941) . . 8

People v Beckley, 434 Mich 691 (1990) . . . 11

People v LaLone, 432 Mich 103 (1989) . . . 12

People v Purman, 216 Mich 430 (1921) . . . 23

United States v Bays, 448 F2d 977 (CA5 1971) 23

United States v Iron Shell, 633 F2d 77 (CA8 1980) 12

Wood v Lockhart, 809 F2d 457 (CA8 1987) . . 8

OTHER:

14th Amendment to the United States Constitution 8

28 USC [1257(3) 2

Fourteenth Amendment 2

Michigan Rules of Evidence 803(4) 5

MRE 803(4) 7

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

MARK HETZNER,

Petitioner

vs

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

Michigan Court of Appeals No 124 959

PETITION FOR A WRIT OF CERTIORARI

Mark Hetzner, by his attorney, Carl Ziemba, prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered in this cause on July 29, 1992, leave to appeal denied by the Michigan Supreme Court by

Order dated December 30, 1992, Docket No 94465.

OPINION AND ORDER BELOW

The Opinion of the Michigan Court of Appeal is unpublished. It is set forth in full below as Appendix, 1a, as is the Order of the Michigan Supreme Court denying leave to appeal.

STATEMENT OF JURISDICTION

The judgment and opinion of the Michigan court of Appeals was entered July 29, 1992. Timely application for leave to appeal was denied by Order of the Michigan Supreme Court on December 30, 1992.

This Court's jurisdiction is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides, in pertinent part:

'. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.'

STATEMENT OF THE CASE

Petitioner was convicted by jury of three counts of criminal sexual conduct of the first degree and one count of criminal sexual conduct of the second degree [Michigan Compiled Laws 750.520b(1)(a); 750.520c(1)(a). He was sentenced to three concurrent terms of 15 to 30 years and to a concurrent term of 10 to 15 years.

The complainant, a five and a half year old girl, testified that on a day certain, petitioner inserted his finger into her vagina but not

into her anus and that on the following day, he inserted his finger into her vagina and into her anus.

After the second alleged assault, the child was taken to a hospital where she was examined by a medical doctor. This doctor was called by the prosecution as part of its case in chief. He testified that prior to his examination of the child, he had a 'chart' upon which was stamped 'Possible sexual assault' and nothing else. He stated his 'purpose there at that time was to examine the young lady for possible sexual assault'. Petitioner's counsel objected, stating that 'my objection goes to any statements that he relates from this young lady as being strictly hearsay and not in the furtherance of any treatment'.

The trial court overruled the objection and admitted the following testimony of the doctor

under Michigan Rules of Evidence 803(4):

'Since I copied several of her statements word for word, I wonder if I might refer to those -- if you would want me to say what it is she said.'

* * *

'"He put his finger up both my privates." Another time: "He twisted his finger up my butt. He wanted me to give him a hug."'

* * *

'After a short discussion about trying to understand whether she understood it, what it was she was telling me, I asked her if -- if he did anything additionally to her, besides that that I have just quoted her as saying; and she said no. "He was just playing with my privates." Asked if that was painful, she said it hurt when he did it.'

* * *

'She said that he hugged her while he had his finger in her rectum and I do not believe that that would result in any observable change in the rectum.'

The doctor also testified as follows:

'I found three abnormalities. There was a generalized redness of the external genitalia. There was a swelling of the area between the bladder opening and the vaginal area enough that I was not able to see the urinary opening. And there was a small tear in the hymenal ring.'

Petitioner testified in his own behalf and stated that he had been present in the lath house on both days and that the child had also been present, but petitioner denied having sexually molested the child.

REASONS FOR GRANTING THE WRIT

Petitioner is not claiming a confrontation deprivation. After all, the child was a witness and was subject to cross-examination concerning what she had said to the medical doctor. California v Green, 399 US 149, 158 (1970).

Petitioner's position here is rather straight-forward: The testimony of the medical doctor as to what the child had told him about the alleged incidents was hearsay and it did not fall within the exception spelled out under the terms of MRE 803(4) for the reason that the statements were not 'reasonably necessary to [the] diagnosis and treatment' for which the child was presented to the medical doctor. The case boiled down to a contest of credibility between the child and petitioner. The admission of that portion of the medical doctor's testimony concerning what the child had told him was prejudicial to the petitioner because it

tended to corroborate her testimony and stood as a vouch for her credibility and served no other purpose in the lawsuit. The admission of this evidence constituted a severe privation of petitioner's right to due process and to a fair trial under the 14th Amendment to the United States Constitution. Although the individual states are free to adopt whatever rules of evidence they deem proper, such rules and applications must not 'fail[] to observe that fundamental fairness essential to the very concept of justice'; in this case, it should be found that 'the absence of fairness fatally infected the trial' and that the acts here complained of 'necessarily prevent[ed] a fair trial'. Lisenba v California, 314 US 219, 236 (1941). See also: Wood v Lockhart, 809 F2d 457, 461 (CA8 1987).

It is a fair inference from the testimony of the child's mother, that the mother took the

child to the hospital to be examined:

> Q [by prosecutor] Where did you go?
>
> A We went to the hospital.
>
> Q What did you do at the hospital?
>
> A Went to the emergency room, and had Sara examined. (T186)

And the medical doctor testified that the child 'was brought to the emergency department for an evaluation'. And the medical doctor was candid enough to testify in response to an inquiry whether the child 'was here asking for your help' as follows:

> A The five-year-old was there asking for my help? No, I don't believe a five-year-old comes to the emergency room asking for help.' (T237)

Hence, the question is: What needed the medical doctor to learn from the child who had been brought to the hospital for an examination and whose chart had been stamped 'Possible sexual assault'? No treatment of the child was asked of the medical doctor, nor at the point that the child was brought to him did he contemplate administering any treatment to the child.

And still MRE 803(4) clearly provides that statements made by a person to a doctor can escape exclusion from evidence by the hearsay rule only 'insofar as reasonably necessary to such diagnosis and treatment'. The entire subsection of the Rule reads as follows:

> 'The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

'(4) Statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.'

The rationale behind MRE 803(4) was explicated by the Court in People v Beckley, 434 Mich 691, 728 (1990):

'Evidence is admissible under MRE 804(3) because of its reliability, i.e., pa-

> tients normally do not fabricate with regard to the cause of an injury or when they may have pain. The statements made to a doctor are cloaked with a sense of reliability because accuracy is necessary for diagnosis and treatment.'

From the comments of the Court in People v LaLone, 432 Mich 103, 110 (1989), it is clear that the interpretation of MRE 803(4) by the Court was based in part upon the case of United States v Iron Shell, 633 F2d 77, 84 (CA8 1980)- where the Court with seeming approval stated:

> 'In admitting this testimony, the Iron Shell panel defined a two-pronged test for admission of hearsay evidence pursuant to FRE 803(4). First, the declarant's motive in making the statement must be consistent with the purposes

> of the rule, i.e., the promotion of treatment. Second, the content of the statement must have been of the type reasonably relied upon by a physician in diagnosis or treatment.'

And examination of the language of the Court in United States v Iron Shell, supra, reveals a dimension to the rationale behind the rule which is not evident in the language of the Michigan Supreme Court:

> 'The rationale behind the rule has often been stated. It focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says. It is thought that the declarant's motive guarantees trustworthiness sufficiently

to allow an exception to the hearsay rule.' Id, at 83-84. [emphasis added]

Surely the rationale above expressed was developed on the basis of the 'normal' medical situation, that is, a situation wherein an adult or a person of the age of reason and ordinary knowledge experiences a trauma or a feeling of sickness or some physical pain or mental distress and voluntarily goes to a medical doctor with only one purpose in mind - to have his condition diagnosed and his symptoms or condition treated. Under these hypothetical circumstances, it is reasonable to assume that the person will recount truthfully the circumstances circumjacent to his condition, especially so because he knows that what he tells the doctor will be held in confidence.

But, the same cannot be said of a child of five years. As the medical doctor himself testified, 'I don't believe a five-year-old comes to the emergency room asking for help'. A five year old child does not know what illness is and that there are people, medical doctors, who have been trained to diagnose and treat illness and injuries and a five year old child does not know that it is advisable if not imperative for the child to tell the doctor truthfully the circumstances which brought about the condition which made necessary a visit to the doctor.

Thus, it is clear that the assumption underpinning the reliability of the statements made by an adult or a person of reason and knowledge contemplated by MRE 803(4) does not obtain in the case of a five year old child, and it must follow that the statements made by the five or six year old child in the case at bench to the medical doctor do not meet the criteria of MRE

803(4) for non-exclusion of the hearsay statements from evidence.

Further, it is clear that the child was not brought to the emergency room for treatment or diagnoses; she was brought simply for 'an examination'. It is clear from the testimony of the mother of the child that she did not believe that the child had been hurt or injured or that she needed medical treatment. The mother testified that after the defendant had left the premises of the nursery, she took the child to a friend's because 'I didn't know what to do. So I asked her what she thought I should do' and that 'eventually' she left the friend's house and 'We went to the hospital', 'Went to the emergency room, and had Sara examined'. If the mother had thought that the child had been injured and needed medical treatment, surely the mother would have 'known' what to do; she would have taken the child to the hospital or to some

medical doctor without hesitation. But, it is fair to infer that the mother did not think that the child had been injured and did not think that the child needed medical treatment but decided to take the child to the hospital for an examination to determine perhaps whether what the child was saying was true.

And it is clear from the medical doctor's testimony that he administered no medical treatment to the child; the record is entirely devoid of any testimony by the medical doctor concerning any treatment that he administered to the child.

Thus, it is clear that the only purpose for which the child was presented to the medical doctor - an examination - could have been accomplished without the doctor's having to ask the child any questions whatever. The doctor had obtained permission from the mother to examine

the child [or had assumed that the mother had given such permission], the child's chart had been stamped 'Possible sexual abuse' and there was nothing which the doctor needed more to learn from the child at that stage of the proceedings. It is conceivable that upon making a physical examination of the child and findings unmistakable clinical evidence of sexual abuse or assault, the doctor might have needed some information from the child in order to properly treat the condition the doctor encountered. But, there was no testimony in the case that in fact this was the situation which obtained and which led to the elicitation by the doctor of the statements in question from the child. The medical doctor found no evidence of any injury to the anus; he found a general 'redness' of the external genitalia and a swelling of the area between the bladder opening and the vaginal area and a tear in the hymenal ring. By the doctor's own testimony, there was nothing that could

restore the hymen to its virginal condition; and the other conditions needed only time to heal, it may be reasonably assumed.

As a result, there is nothing in the case at bench which remotely satisfies the 'two-pronged test for admission of hearsay evidence pursuant to' MRE 803(4) adverted to by the Court in People v LaLone, supra; 'First, the declarant's motive in making the statement must be consistent with the purposes of the rule, i.e., the promotion of treatment. Second, the content of the statement must have been of the type reasonably relied upon by a physician in diagnosis or treatment', id, at 112.

Thus, it is clear that the testimony of the medical doctor here complained of to which the petitioner objected on trial should not have been admitted on trial, and its admission into evidence was clearly prejudicial to petitioner.

The only purpose of the prosecutor in adducing the hearsay testimony of the doctor was to bolster the credibility of the child and her testimony. This is evident from what the prosecutor argued to the jury:

> 'She [complainant] goes into the lath house on July 11th in the afternoon and while she is in there, she tells you what happened to her. . . . She told you that and she said it happened again the next day. . . . But she also told Dr. Love what happened to her. Not four months after it happened but within hours of the second day and Dr. Love indicated for you -- he wrote what she said down verbatim. "He put his finger up both my privates". "Another time he twice had his finger up my butt". Within hours of the second day.'

* * *

'Exact words to Dr. Love: "He twice had his finger up my butt." That is descriptive. He didn't put it, he didn't touch it, he twisted it -- within hours of the last time it happened, she is telling a doctor, she's not telling a police officer, she is not telling anyone but a doctor.'

The prosecutor conceded in his argument that if the jury did not believe the testimony of the child, they should acquit petitioner, and then went on to say:

'But you have got to answer some questions. And one question that you have to answer which nobody has answered to this point is why would Sara lie? Mr. Hetzner testified Sara was in the lath house, he was in the lath house, he was trimming bushes, she was hoeing. she was there that July 11th in the

afternoon. She was there the following afternoon. He said everything Sara said. Except what he did to her. Sara has to tell you that. So Mr. Hetzner wants to say: yes, she was being truthful about everything except she lied about that. Why? Why would she do that?'

One of the oldest and most fundamental rules in the trial of criminal cases is that one cannot show that a witness made the same statements that he made in court at an earlier time out of court in order to show or prove that the in-court testimony of the witness is truthful. The fact, for example, that the complainant testified in court that the defendant had robbed him at gun point is not established as the truth simply because the complainant told a dozen people before trial that the defendant had robbed him at gun point. The rule has been put

as follows by the Court in United States v Bays, 448 F2d 977, 979 (CA5 1971):

> 'The general rule appears to be that testimony of a witness may not be bolstered by showing that he has previously told the same story out of court.'

The Court in People v Purman, 216 Mich 430, 437 (1921) approved the following legal principle as set forth in 40 Cyc 2787:

> 'As a general rule a witness cannot be corroborated by proofs that on previous occasions he has made the same statements as those made in his testimony; and the rule is the same whether the previous statements were made verbally or in writing, and applies equally to statements under oath and unsworn statements.'

Unfortunately, the Michigan appellate courts regard MRE 803(4) as a rule creating carte blanche for the prosecutor to circumvent the rule against the use of prior consistent statements simply because the Rule states that statements made to a medical doctor for purposes of diagnosis and treatment are not hearsay. The Michigan appellate courts have not carefully examined into the intent and purpose behind the adoption of MRE 803(4). It is to be highly doubted that MRE 803(4) was adopted in order that prosecutors might be able to bolster the credibility of victims of sexual assault or abuse by the use of prior consistent statements of the victims made to a medical doctor.

CONCLUSION

Petitioner prays this Court issue a Writ of Certiorari to the Michigan court of Appeals.

Respectfully submitted,

Carl Ziemba
Attorney for Petitioner
Attorney of Record
703 W Hancock
Detroit, Michigan 48201
(313) 833 5145

Detroit, Michigan
February 3 , 1993

APPENDIX

OPINION of Michigan Court of Appeals
Entered July 29, 1992

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
July 29, 1992

Plaintiff-Appellee,

v

No.124959

MARK HETZNER,

Defendant-Appellant

Before: Holbrook, Jr., P.J., and Griffin and Marilyn Kelly,JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. MCL 750.520b(1)(a); MSA 28.788(2)(a); MCL 750.520c(1)(a); MSA 28.788(3)-(1)(a). The judge sentenced him to concurrent terms of fifteen to thirty years' imprisonment for each first-degree CSC conviction and ten to

fifteen years for the second-degree CSC conviction.

Defendant argues on appeal that he was denied due process and a fair trial by the admission of a physician's recitation of statements made by the victim. He argues also that the trial judge abused his discretion in: (1) declaring the victim competent to testify; (2) denying the motion for a new trial arising from charged jury misconduct; and, (3) allowing the testimony of the victim to be read back to the jury. He argues that the prosecutor's closing argument denied him due process and a fair trial. Finally, he asserts, the judge erred by allowing the physician to read from his medical report without a proper foundation having been laid. We affirm.

Defendant was convicted of sexually assaulting his employer's five-year-old daughter. The

victim testified at trial that defendant put his finger in her rectum and vagina on two consecutive days. The second day, the victim's mother took her to a hospital where Dr. Neil Love examined her.

Dr. Love testified that he recorded verbatim what the victim told him. After a hearsay objection by defense counsel, the court allowed Dr. Love to state what the victim had said. MRE 803(4). Reading from his medical report, he repeated her words: "He put his finger up both of my privates . . . ."

The physical examination of the victim revealed three abnormalities in the genital area: generalized redness of the external genitalia, swelling of the area between the bladder opening and vaginal area and a small tear in the hymenal ring.

After the jury verdict, defendant filed a motion for a new trial alleging jury misconduct. The trial judge conducted a hearing and denied the motion, finding no credible evidence to support it.

On appeal, defendant argues that Dr. Love's repetition of a verbatim statement made to him by the victim was inadmissible hearsay. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment are a recognized exception to the hearsay rule. MRE 803(4). Not excluded by the hearsay rule are:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source thereof insofar as reason

ably necessary to such diagnosis and treatment [MRE 803(4)].

The Michigan Supreme Court recently explained the rationale for the medical treatment hearsay exception. People v Meerboer, 439 Mich 310; ___NW2d ___ (1992). In Meerboer, the Court indicated that supporting rationale for MRE 803(4) is the existence of (1) the self-interest motivation to speak the truth to treating physicians in order to receive proper medical care and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.

In Meerboer, the Court indicated that trustworthiness of a child's statement to a physician can be determined by looking at the totality of circumstances surrounding the making of the statement. Relevant facts are the age and maturity of the declarant, the person eliciting

the medical examination, the timing of the declaration, and the existence or lack of motive to fabricate. Id. The trustworthiness of the child's statement is strengthened when supported by other evidence. Id.

In Meerboer, the Court recognized that, to ensure reliability of the our-of-court identification of the assailant, the statement must be reasonably necessary to diagnosis and treatment. Identification of the assailant can be as important to the health of the child as treatment of the physical injuries that are apparent to the physician. Such information also allows physicians to structure the examination and may be necessary to prescribe the manner of treatment.

In this case, we find that the statement made by the victim to Dr. Love was trustworthy. The medical examination took place the same day as

the second assault and before any formal investigation. The victim's mother, not the police or the Department of Social Services, requested the examination. There was no evidence that the victim was fabricating her story. Further, there was corroborating evidence of the assault; the victim identified defendant as the assailant, and there was physical evidence consistent with sexual penetration.

The child's statement to her physician was also reasonably necessary for her medical treatment and diagnosis. Here there is a stronger case than in Meerboer for its admissibility. Dr. Love did not identify the assailant at trial. He indicated that the victim's statement about the item used for penetration and the circumstances surrounding the assault were important for his diagnosis and treatment. We agree. We conclude that sufficient evidence was presented to support admission of the statement

made by the victim to Dr. Love under MRE 803(4).

Defendant next asserts that the trial court abused it discretion in declaring the five-year-old victim competent to testify. Whenever someone under ten years of age is produced as a witness, the judge must determine whether the child has sufficient intelligence and sense of obligation to tell the truth. People v Coddington, 188 Mich App 584; 470 NW2d 478 (1991); MCL 600.2163; MSA 27A.2163. Absent an abuse of discretion, we will not reverse a judge's decision to allow a child to testify. Coddington, supra. After reviewing the record in this case, we are convinced that the judge did not abuse his discretion in allowing the child to testify.

Next, defendant argues that the judge abused his discretion in denying the motion for new trial based on alleged jury misconduct. Defen

dant contended that the jurors were bribed by the assistant prosecutor or by the victim's parents. He requested a new trial. The judge held a hearing to determine the validity of the alleged instances of misconduct. After testimony from approximately twenty witnesses, he ruled there was no credible evidence to support the motion for a new trial. We find nothing in the record to suggest that the trial judge abused his discretion in denying the motion.

In addition, defendant argues that the prosecutor improperly shifted the burden of proof during closing argument. The prosecutor had asked the jury why the victim would lie. There was no objection. Even if the question was inappropriate, any prejudice could have been cured by an instruction. People v Duncan, 402 Mich 1, 15-16; 260 NW2d 58 (1977); People v Foster, 175 Mich App 311, 317; 437 NW2d 395 (1989).

Defendant also argues that the court erred in allowing Dr. Love to read from his medical report, although it had not been qualified as a past recollection recorded. MRE 803(5). Defendant made no objection, so a proper foundation was never laid. We consider the issue waived. People v Furman, 158 Mich App 302, 329-330; 404 NW2d 246 (1987).

Likewise, defendant's argument that the trial judge erred in allowing the testimony of the victim to be read back to the jury was waived, as defendant failed to object at trial.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Richard Allen Griffin

/s/ Marilyn Kelly

ORDER of Michigan Supreme denying leave to Appeal. ENTERED: December 30, 1992

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

ORDER

Entered: December 30, 1992

94465

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 94465
COA: 1249959
LC: 89-02753 FC

MARK HETZNER,

Defendant-Appellant

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

21222

[Seal] I, Corbin R. Davis, Clerk of the Michigan Supreme Court,certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

December 30, 1992. /s/ Jacqueline B. McKinnon

Deputy Clerk